

An appeal

- by -

Arbutus Custom Cabinets Ltd.
("Arbutus")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2001730

DATE OF DECISION: December 7, 2001



DECISION

OVERVIEW

This is an appeal by Arbutus Custom Cabinets Ltd. (“Arbutus”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a referral back to the Director of a Determination issued by the Director of Employment Standards (the “Director”) dated May 23, 2001. The Determination found the Theriaults to be employees within the meaning of the *Act*.

The referral, BC EST #D456/01, ordered the Director recalculate the amount owing Robert Theriault (“Robert”) and Kevin Theriault (“Kevin”) or (the “Theriaults”) for overtime, vacation pay and statutory holiday pay plus interest.

The delegate for the Director determined that Robert was owed \$2,848.29 including interest and Kevin was owed \$2,715.19 including interest.

According to the delegate, the Theriaults have accepted the recalculated amount. Arbutus has not and seeks a ruling the Theriaults were contractors.

ISSUE

Were Robert and Kevin employees of Arbutus and, if so, are they owed the amounts determined by the Director?

THE FACTS AND ARGUMENT

Arbutus submitted the following points in their appeal:

1. Robert’s Renovations and Repairs owned 90% of the tools.
2. They worked unsupervised.
3. They established their rate of pay.
4. They had a business card, Robert’s Renovations and Repairs.
5. They lied about why they left Unit A, 2240 Dorman Road
6. The reason Arbutus had the Theriaults keep a record of hours per contract was for their computer program. This was not taken into consideration in the decision.
7. Robert’s Renovation and Repair completed and solicited contracts before, during, and after the period in question



Arbutus listed three contracts which they believe fall in this category. They are:

- Residential Contract in Shawnigan Lake
- Mecartan contract in Terminal Park at as rate of \$15.00 per hour.
- Solicited a kitchen contract with JR contracting (Earl Wallace)

Arbutus believes this shows the Theriaults did not “meet the guidelines set out by Employment Standards as being employees and with their track record of lying to get Employment Insurance we know that we can prove that they lied about being employees as well”.

ANALYSIS

I accept that Robert Theriault or Robert’s Renovation and Repair owned a large portion of the tools used by Arbutus. That was in evidence at the hearing. Arbutus paid \$100.00 per month for rental of some or all of the tools supplied by the Theriaults.

I will agree that is not a normal situation for employees to supply tools in the quantity supplied by the Theriaults however it does not make them contractors if they do.

The fact they worked unsupervised was also in evidence at the hearing. It is not unusual for tradesmen on small contracts to work unsupervised and, again does not make them contractors for doing so.

With all due respect the rate of pay the Theriaults received was negotiated at the time they were hired. That rate was paid by Kelly Contracting, Paradise West Cabinets and Millwork, Kelper Industries and finally by Arbutus. If Arbutus was dissatisfied with that rate it was entirely in their power to change or correct it regardless of whether the Theriaults were contractors or employees. In fact Arbutus did just that by proposing a different way of paying the Theriaults which gave rise to them leaving.

The fact that Robert had a business card with Robert’s Renovation and Repairs listed on it does not make him or them contractors. We must be aware at no time did Arbutus pay any money to Robert’s Renovation and Repairs. All monies paid to the Theriaults were paid personally to Robert and Kevin. I am aware the evidence from Arbutus stated they paid Robert and Kevin personally because Robert’s Renovation and Repair did not have a business bank account. It might have made a considerable difference to the case if the monies had been paid to a business account.

I am not in a position to comment on whether the Theriaults lied about why they left Unit A, 2240 Dorman Road.



The reason for having a record of hours by Robert and Kevin was taken into account in the decision. At page 4 of the decision the last paragraph states, in part:

They kept a record of the hours they worked on each job and were paid straight time for all hours submitted. Arbutus claim they used time sheets for the purpose of tracking hours on each job or contract because, as a new company, they wanted to check their bidding prices.

The allegation Robert's Renovation and Repairs performed contract work before, during and after the period in question bears some comment. I recall some discussion at the hearing in regard to the Shawnigan Lake contract. As I recall Kevin indicated it was done as a favour for a friend and was done on the weekend. Part of the payment was in the form of one half of a pig. I do not recall any discussion in respect to the Mecartan contract or the JR Contracting work. There was some discussion about work that Robert's Renovation and Repair did at Woodgrove Mall after leaving Arbutus.

We heard no evidence to indicate Arbutus had a contract with either Robert's Renovation and Repair or Robert Theriault to work exclusively for Arbutus. While I can appreciate that Arbutus would not want employees to work in competition with the company there was no legal barrier to prevent it. The Theriaults, by evidence of their time sheets, were working full time for Arbutus and in fact were working overtime. This would not appear to leave much time to be "moonlighting" on their own. The fact they may or may not have done other work while employed by Arbutus does not change the fact the Determination, in applying the four-fold test, found Robert and Kevin to be employees within the meaning of the *Act*.

The evidence presented by Arbutus could be used to establish the Theriaults were subcontractors except for some significant points. Under the four-fold test profit and loss is a factor and the Theriaults had no opportunity to benefit or lose under the method they were paid. They were paid an hourly rate. Robert attempted to have Arbutus pay them a percentage of the profits and that was refused by Arbutus. The fact they were paid personally also strongly supports the position they were not subcontractors. They also were clearly integrated into Arbutus' business.

As indicated in the original decision, I accept Arbutus believed the Theriaults to be subcontractors. That was evident in the way they were paid which was different than the other employees of Arbutus.

Notwithstanding that, the decision stated:

There is an obligation on the appellant to prove the Determination erred in fact or in law and on the evidence before me Arbutus has failed to establish the Theriaults were subcontractors.

For the above reasons I do not find sufficient reasons in the evidence presented in this appeal to change Decision #2001/456 issued September 28, 2001.



The recalculation done by the Director is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the recalculation by the Director dated October 15, 2001. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal